Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN H. PARSA,

Petitioner,

v.

JAMES C. WHITE, JR., individually and in his official capacity as the Director of the Finance Department of The State of Alabama; and HALYCON V. BALLARD, in her official capacity as the Director of the Personnel Department of the State of Alabama,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a mid-management, merit system career employee in state service can be denied a job benefit based upon his political persuasions or associations without a showing by the hiring authority that political affiliation is a necessary requirement for the effective performance of the position involved?

2. Whether a public hiring authority can establish more than a mere pretextural legitimate nondiscriminatory reason for actions that could otherwise be discriminatory under Title VII, the ADEA, or the Equal Protection Clause where the actions were taken solely due to the political affiliation of the affected employee and where political affiliation was not shown to have been an appropriate requirement for the effective performance of the position involved?

3. Whether the Defendant White is entitled to the defense of qualified immunity despite the law being long established that is unconstitutional to deprive a public employee of a position because of his political affiliation or persuasion where political affiliation is not shown to be an appropriate requirement for the effective performance of the job in question.

4. Whether the mixed motive theory of the Civil Rights Act of 1991 applies in this case where there is direct evidence of discrimination?

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b) Petitioner represents that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit was entered on August 8, 1995 (App. 1a) and the order denying rehearing and rehearing en banc was entered on October 11, 1995 (App. 27a). Unpublished decisions of the United

States District Court for the M.D. of Alabama were entered on August 22, 1994 (App. 2a) and September 9, 1994 (App. 26a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated August 8, 1994 (App. 1a), and that Court denied rehearing and rehearing en banc on October 11, 1995 (App. 27a).

The statutory provision conferring jurisdiction upon this court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1). Rule 10 of the Supreme Court Rules provides for review of a court of appeals decision when the decision has (a) "so far departed from the accepted and usual cause of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's power of supervision," or when the court of appeals (b) "has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflict with applicable decisions of this court".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 U.S.C. § 1981. *Equal rights under the law.*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evi-

ence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e-2(a). *Unlawful employment practices.*

It shall be an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(m).

Except as otherwise provided in this title [42 USCS §§ 2000e *et seq.*], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 6102. *Prohibition of discrimination.*

Pursuant to regulations prescribed under section 304 [42 USCS 6103], and except as provided by section 304(b) [42 USCS § 6103(b)] and section 304(c) [42 USCS § 6103(c)], no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

Alabama Code § 36-26-2(14). *Provisional appointment.*

An appointment made for a period of not more than 156 work days to fill a competitive position pending the establishment of an employment register for the classification.

Alabama Code § 36-26-17. *Manner of filing of vacancies in classified service generally; appointments in classified service generally.*

Vacancies in the classified service shall be filled either by transfer, promotion, appointment, reappointment or demotion.

Whenever a vacancy is to be filled by appointment, the appointing authority shall submit to the director a statement of the title of the position and, if requested by the director to do so, the duties of the position and desirable qualifications of the person to be appointed and a request that the director certify to him the names of persons eligible for appointment to the position. The director shall thereupon certify to the appointing authority the name of the 10 ranking eligibles from the most appropriate register and, if more than one vacancy is to be filled, the name of one additional eligible for each additional vacancy or all the names on the register if there are fewer than 10. Except that in the appointment of attorneys or legal research aides under this section by the attorney general for appointment in the office of the attorney general the director shall certify to the attorney general the names of all eligibles who meet the minimum qualifications for the particular class of attorneys. The attorney general may then appoint any person on the register of eligibles without regard to position on that register. If it should prove to the director that any person is not willing to accept the position, the appointing authority may request that additional names be certified until 10 persons eligible and available for appointment have been certified. Within 10 days after such names are certified, the appointing authority shall appoint one of

those whose names are certified to each vacancy which he is to fill; except, that, in the event that he has fewer than the authorized number of persons from which to make his selection, he may choose from the remaining certified names or if he has fewer than three persons from which to make his selection he may make a provisional appointment as provided by section 36-26-18. In the event that there does not exist an employment register which the director deems to be appropriate for the class in which the position is established, he shall prepare such a register within a reasonable time after receipt of the request of the appointing authority that eligibles be certified. Whenever an eligible has been certified to and rejected by appointing authorities three times, the director may remove the name of such person from the employment register.

Alabama Code § 36-26-18(e). *Extraordinary appointments.*

Whenever it is impossible to certify eligible persons for appointment to a vacancy in the classified service, the appointing authority may nominate a person to the director. If such nominee is found by the director to have had experience and training which appear to qualify him for the position, the director may authorize the appointment of such person to such vacancy only until an appropriate eligible register can be established and appointment made therefrom. In no event shall a provisional appointment be continued for more than 156 workdays. Successive provisional appointments of the same person shall not be made.

Alabama Code § 41-4-220. *Created.*

There shall be in the department of finance a division of data systems management.

Alabama Code § 41-4-222. *Director.*

The division of data systems management shall be headed by and under the direction, supervision and con-

trol of an officer who shall be designated as director of such division, to be appointed by the director of finance with the approval of the governor.

STATEMENT OF THE CASE

A. Course of Procedings and Dispositions in the Court Below.

John H. Parsa initiated this action on November 8, 1993 by filing a complaint alleging that his removal from a provisional appointment in the service of the State of Alabama constituted discrimination against him because of his age, race (Caucasian), color (white), sex (male), and national origin (Iranian). R1-1. He named as Defendants James C. White, Sr., individually and as Director of the Finance Department of the State of Alabama, and Halycon C. Ballard, in her official capacity as Director of the Personnel Department of the State of Alabama.

After securing a right-to-sue letter from the EEOC, Parsa amended his complaint to include claims under Title VII of the Civil Rights Act of 1964 ("Title VII"). R1-23.

On March 8, 1994, the Trial Court entered rulings eliminating some of the claims. R1-15. The individual capacity claims against White that were based upon 42 U.S.C. § 1981 and the equal protection clause remained viable, as did the ADEA claim against him in his official capacity. R1-15-9.

As a result of information received upon discovery, Parsa filed a motion to add a contention to the pretrial order to the effect that White had punished him for his perceived political loyalty in violation of his First Amendment right to freedom of association. R1-41. On August 22, 1994, an order was entered granting summary judgment in favor of the Defendants upon all of the claims (R2-48), and the order was accompanied by a memorandum opinion. R2-47.

The Plaintiff Parsa filed a timely motion under Rule 52(a) and Rule 52(b) to alter or amend the judgment

and/or findings (R2-49), which was denied by the trial court on September 9, 1994. R2-50.

On September 16, 1994, Parsa filed a notice of appeal to the Eleventh Circuit Court of Appeals. On August 8, 1995, a panel of that Court affirmed the trial court decision, per curiam, without opinion.

Subsequently, on August 28, 1995 Parsa filed a suggestion of rehearing En Banc and Petition for Panel Rehearing. On October 11, 1995 the request for rehearing was denied.

B. Statement of the Facts.*

The Petitioner, John H. Parsa, is a white caucasian male of Iranian origin, who was 49 years of age at the time the facts in this case unfolded. Parsa first employment with the Alabama State Finance Department was in July of 1990, when he was selected to be assistant director of the Department's Data Systems Management Division (DSMD).

On August 27, 1992, at the same time he requested that Parsa be provisionally appointed as DSMD Director, Hunt's Acting Finance director, James Rowell, also requested the State Personnel Department to create a promotional register to be used in making the appointment to the position of DSMD Director. The Personnel Department ultimately created—and the DSMD Director position was ultimately filled—from an open competitive register. An open competitive register can include applicants who are not presently state employees as well as existing employees eligible for promotion.

The Data Systems Management Division was developed to coordinate all computer networking in the state government. *See* Ala. Code § 41-4-220 (1975). The Finance

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*** This statement of the facts is largely drawn from the trial court's order and, in many instances, is substantially copied therefrom, but not placed in quotation marks. The trial court's version is in its memorandum opinion at App. ——. When the Appellant adds facts not alluded to by the trial court, the approriate references to the record are being made.**

Director's appointment of the DSMD Director is required to be approved by the Governor. Ala. Code § 41-4-222 (1975).

The required range of knowledge and abilities specified for the position included knowledge of information systems, management principles, Alabama state government, the legislative process, information sources, and state laws, and candidates were required to have the ability to respond quickly, to communicate well and to comprehend policies. Parsa was provisionally appointed as DSMD Director. By statute, a provisional appointment may not exceed 156 working days. (Ala. Code §§§ 36-26-2[14], 36-26-18[e] [1975]), and can be canceled at any time, there being no legal requirement that a provisional appointment be made permanent. Witnesses agreed, however, that there existed a long-standing practice of making provisional appointees permanent if they were reachable on the register. R1-33-3 and Exhibits O and P to original appeal. Sixteen applicants were accepted by the Personnel Department as qualified for the position of DSMD Director on an open competitive basis. Among these applicants were: plaintiff Parsa; Roderick Benton, then a fifty-nine-year-old white male, who had twice served as assistant director of DSMD and was Parsa's immediate predecessor as acting director of DSMD; and Jacquelyn Patillo, a then thirty-three-year-old black female.

On April 22, 1993, Governor Hunt was convicted of felony ethics charges and stepped down as Governor, and Lt. Governor Folsom was sworn in as Governor. On or about April 27, 1993, Mr. White was appointed Finance Director. The same day, newly-appointed Finance Director White (who is black) received a letter from Charlie D. Waldrep (who is white), as the chief of new Governor Folsom's transition team. Waldrep requested the immediate cancellation of the provisional appointment of Parsa as Director of DSMD, and the transfer from Parsa of all of the electronic security system. Waldrep testified that former Governor Hunt's outgoing chief of staff had ex-

pressed the opinion to Waldrep that Parsa may not serve the new Folsom Administration well because of his friendship to Governor Hunt's son and his loyalty to the Hunt administration.

By letter dated July 10, 1993, Finance Director White canceled Parsa's provisional appointment. The trial court noted a strong disagreement between Folsom's initial transition chief Waldrep and his transition director, John Tanner, as to whether Parsa should be appointed as DSMD Director. R2-47-18. Tanner was characterized by the court as an "avid champion of Parsa's candidacy." R2-47-18.

Waldrep's opposition to Parsa was not based upon any defect in Parsa's character or upon any suspicion that he had or would in any way misuse the state's computer system or security system but was centered *solely* upon Waldrep's being told that Parsa had been loyal to Governor Hunt and to Hunt's son, Keith. R2-44-exhibit 1, Waldrep Deposition, pp. 19, 21-22, 27, 31-32 (in separate envelope). In fact, the security system was not a primary responsibility of the DSMD Director, and was later removed from among the ancillary duties of that position. R2-49-attachment, p. 4. Although White testified that Waldrep had told him that the security system under Parsa had "some serious problems" and that it was being used to "spy on people and all sorts of things." Waldrep recalled no such conversation. R2-39; R2-44, attachment of Waldrep deposition excerpt, p. 53.

According to the testimony of Governor Folsom, if White had recommended Parsa as DSMD Director, the Governor would have approved Dr. Parsa's selection. Folsom would have appointed Parsa even if Folsom had been advised that Parsa had been loyal to Hunt. R2-39; R2-44, Folsom Deposition, pp. 18-19, 20-21, 28-30.

On June 14, 1993, Defendant Ballard certified the ten applicants with the highest scores and issued a certification of eligibles for the DSMD Director position. On

that list, Parsa was listed first; Benton, third; and Patillo, tenth.

In making his selection for DSMD Director, White claimed he studied in detail the applications of Rod Benton and Patillo only, and interviewed only those two applicants. Rowell, as the outgoing acting Finance Director in the Hunt Administration, recommended Parsa for the position. *According to White, he did not even consider Parsa for the position because of Waldrep's opposition to Parsa's appointment.*

White claimed he first offered DSMD Director position to Rod Benton, but that Benton suggested that a younger person be hired. If indeed this offer was made to Benton, Parsa contends that it was no more than a ruse, since it was general knowledge that Benton would not accept the position. R1-33-6, exhibit O, p. 149; R2-49-12, 13. White claims that he appointed Patillo to the position of DSMD Director as his second choice. Parsa returned to his position as assistant DSMD Director, a position that he continues to occupy.

There was considerable evidence that Parsa was eminently qualified for the DSMD Directorship, and that although Patillo placed tenth on the certificate of eligibles, *she was, in fact, not qualified for the position,* and that White was made aware of Patillo's lack of qualifications on several occasions. R1-33-14 and supporting exhibit O in separate envelope; R2-44-13 (exhibit 1 in separate envelope). This opinion was given to White on several occasions by Rowell, who had served as subject-matter expert on DSMD Director qualifications. R1-33-14, exhibit D (in separate envelope). In certifying Patillo, certain graduate courses were allowed to be substituted for part of a six-year experience factor, contrary to the DSMD Director job announcement. R1-33-4, exhibits R, pp. 20, 25-26, 31-33 and T, pp. 62-64 (in separate envelope). There was also evidence that White made a comment about "social justice" to Rowell in con-

nection with his decision to hire a lower-ranked black over a higher-ranked white. R1-33-9, exhibit O, pp. 86-87.

The evidence showed a significant propensity of White to prefer the appointment of blacks over whites. Illustrations of this propensity are enumerated at R1-33-9 through 12; R1-33-12.

White testified that the resistance of the Folsom transition chief was only "*part of*" the reasons why he did not consider Parsa for the job. R1-33-5. (Emphasis added).

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION AND ISOLATION OF CENTRAL ISSUE.

As this case wound its way through the pretrial stages, it appeared to a routine Title VII—ADEA—Equal Protection case. As the trial court held, the Plaintiff established the requisite prima facie case for a Title VII claim under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and for an ADEA claim under *Clark v. Coats and Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1990).

It appeared Defendant White's "legitimate, nondiscriminatory" defense would be that Patillo was the more logical choice in spite of Parsa's superior qualifications, because Patillo's "philosophy" was more akin to White's than was that of Parsa, and/or because White wanted someone to fill the position who had not been on the state government scene. R1-33-7. In the case's later stages, however, the issue arose that has been characterized by the trial judge as the "core legal question": *whether the opposition to Parsa that was expressed by the Governor's transition chief completely justified White's refusal to consider Parsa for the job.*

This "core legal question" presents itself in at least three ways: (a) As to the Title VII, ADEA, and Equal

Protection claims, the transition chief's disenchantment with Parsa is used by White as his "legitimate, nondiscriminatory" explanation as to why he rejected Parsa; (b) Parsa claims White's reliance on the transition chief's advice violated his First Amendment right to political freedom and to the freedom of association; and (c) The transition chief's disenchantment with Parsa is used by White in his individual capacity to establish qualified immunity defense.

The new "core legal question" also invokes the mixed-motive theory of the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(m) (Supp. IV 1992), repudiating the rule of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

II. WHITE'S ASSERTED LEGITIMATE NONDISCRIMINATORY REASON WAS A PRETEXT.

As the trial court correctly noted, establishment by an employee of a prima facie case shifts the burden to the employer to produce evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. *St. Mary's Honor Center v. Hicks*, 509 U.S. ——, 125 L.Ed. 2d 407, 113 S.Ct. 2742 (1993). If an employer meets this burden, the employee responds by demonstrating the proffered reasons are pretextual and by persuading the fact finder that the employer's discrimination was intentional, but intentional discrimination may be inferred by the fact finder if a pretext is established. *Id.; Batey v. Stone*, 24 F.3d 1330, 1334, 1335 (11th Cir. 1994).

In the case at bar, White (and Waldrep) elected to rely upon the fact that Parsa was loyal to a governor other than Folsom as a reason for rejecting his candidacy, but their testimony is in sharp conflict. R-2-44-Exhibit 1 Waldrep Deposition pp. 19, 20, 21, 22, 17, 31, 32 (in separate envelope); R2-39-4. Courts have long held that a governmental official "may not deny a benefit to a person on a basis that infringes his constitutionally-

protected interests,"—and in particular the rights to free speech and associations. *See Perry v. Sindermann*, 40 U.S. 593, 597 (1972).

The *Perry* principle is tempered by the "balancing test" espoused in *Pickering v. Board of Education*, 391 U.S. 563 (1968), in cases of the speech and associations of public employees. *Connick v. Myers*, 461 U.S. 138 (1983); *Bates v. Hunt*, 3 F.3d 374 (1993); *McDaniel v. Woodard*, 886 F.2d 311 (11th Cir. 1989); *Abbott v. Thetford*, 534 F.2d 1101 (5th Cir. 1976). There has been *no showing* here that Parsa's appointment would have disrupted anything.

The directorship of DSMD, although a position of significant importance, is not one standing in a close or confidential relationship to White or to the Governor. The position is a "second-line" one, where Parsa reported to the Assistant Finance Director for Information Services, and rarely came into contact with the Finance Director or with the Governor of Alabama. R2-49-attachment, p. 2.

Because White failed to point to a position of confidence to justify his rejection of Parsa, the trial court turned to political patronage cases like *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), to justify its decision. In so doing, at R2-47-24, it said, "[t]here can be no dispute that the Director of DSMD occupies a political policymaking position that is entrusted with maintaining the security of numerous confidential documents affecting every area of state government." After making that finding, the trial court held that this case is controlled by *Stegmaier v. Trammel*, 597 F.2d 1027 (5th Cir. 1979). *Trammel*, however, presented a totally different set of facts from the case at bar, with the introductory synopsis by the Former Fifth Circuit being totally descriptive:

> "We affirm, holding that *a public employee occupying a position of confidence, loyalty, and trust*

> by virtue of her status *as the single deputy and assistant to an elected official* may be discharged solely on the ground of political affiliation without infringing her constitutional rights.' ' (Emphasis added).

The distinction between the two cases is clear. John Parsa, or a career merit system employee, was far from being the single deputy and assistant of an elected official.

In patronage cases, the critical question is not whether the employment may be designated as a policymaking or confidential one, but "whether the hiring authority can demonstrate that [political] affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel,* 445 U.S. 507, 518 (1980).

In this case, White has not shown that political loyalty is an appropriate requirement for the DSMD directorship and has not proffered a legitimate, nondiscriminatory reason for his decision but that, to the extent he has, the reason is pretextual.

III. PARSA'S FIRST AMENDMENT CLAIM.

Much of the previous argument could be restated in support of Parsa's claim of violation of his rights to expression and association, and those points are simply incorporated herein by reference.

In a patronage case, as in the case of other First Amendment claims, a court must determine whether an employee's political affiliation or beliefs was a substantial or motivating factor in the treatment he or she received. *See Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1976); *Parker v. Wallace,* 596 F.Supp. 739, 743 (M.D. Ala. 1984). That question is automatically answered in Parsa's favor through the direct and undenied admissions of White. The next question under *Mt. Healthy* standards is whether the employer can show that the same decision would have been reached if political affiliation had not played a role. *Id.* at 743.

White has made no effort to offer such proof, relying instead on the perceived propriety of his actions.

IV. THE QUALIFIED IMMUNITY ISSUE.

White has raised the defense of qualified immunity, which would only shield him from individual liability for damages. See *Moore v. Morgan*, 922 F.2d 1553, 1556 (11th Cir. 1991). Since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the defense is limited to an objective standard. Once a defendant shows that his actions were within the scope of his discretionary authority, the plaintiff must show that the official's actions "violated clearly established constitutional law". *Rich v. Dollar*, 841 F.2d 1558, 1563-64 (11th Cir. 1988) quoting *Zeigler v. Jackson*, 716 F.2d 847, 849) (11th Cir. 1983).

For several decades, the law has been clear that discrimination based upon race, age, political affiliation, and the exercise of free speech and association is prohibited. White has not been able to show that his actions here fall within any of the exceptions to such prohibition.

V. THE "MIXED MOTIVE" ISSUE.

The trial court disposed of the "mixed motive" issue in this case by explaining, at R2-47-20, that the Civil Rights Act of 1991 (42 U.S.C. § 2000e-2[m]) provided that "an intervening legitimate race-neutral motive cannot absolve an employer of liability once discrimination has been shown to be a motivating factor in the employment decision." The court noted that the provision had been calculated to repudiate the rule of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which had adopted the *Mt. Healthy* order of proof methodology.

Citing *Burns v. Gadsden State Community College*, 908 F.2d 1512, 1518 (11th Cir. 1990) (per curiam), the trial court observed that this mixed motive theory could not be applied in this Circuit unless the plaintiff produces

direct evidence of intentional discrimination. R2-47-21, n.9.

There was in this case direct evidence of discrimination. Rowell suggested to White that his selection of a black, who was at best marginally qualified, over a highly qualified white person might be looked upon as racially motivated, White used the term "social justice" when referring to his action. Ante, p. 13. As to direct evidence of age discrimination, White also testified that Benton had suggested to him that he hire a younger person than himself, and White did so. R2-47-22. The evidence that White (accompanied by Waldrep) was motivated by political considerations is overwhelmingly direct. Waldrep testified that the Folsom effort had been to retain only those persons who were "apolitical". (R1-33-34 [attached deposition of Waldrep, p. 31]).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order or judgment of the court below should be reversed and remanded to that court so that this case can proceed to trial.

Respectfully submitted,

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Dated: January 11, 1996

APPENDICES

APPENDIX A

[Filed Aug. 8, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-6861

Non-Argument Calendar

D.C. Docket No. CV 93-H-1345-2

JOHN H. PARSA,
Plaintiff-Appellant,
vs.

JAMES C. WHITE, SR., individually and in his official capacity as the Director of the Finance Department of the State of Alabama and HALYCON V. BALLARD, in her official capacity as the Director of the Personnel Department of the State of Alabama,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(August 8, 1995)

Before TJOFLAT, Chief Judge, HATCHETT, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED: See 11th Cir. R. 36-1.

APPENDIX B

[Filed Aug. 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 93-H-1345-N

JOHN H. PARSA,

Plaintiff

VS.

JAMES C. WHITE, SR., ETC.; *et al.*,

Defendants

MEMORANDUM OPINION

When John H. Parsa, provisional Director of the Data Systems Management Division (DSMD) in the Alabama Finance Deartment, was not offered a permanent appointment to that position in July 1993, he instituted this lawsuit. Parsa alleged that he was denied the promotion on account of his race (Caucasian), color (white), national origin (Iranian), age (49 in 1993), gender, and political preference (loyal to former Governor Guy Hunt). In addition, Parsa stated that he has since been discriminated against in retaliation for filing an EEOC complaint.[1]

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[1] The retaliation claim was mentioned in the initial complaint, filed before the EEOC issued a right to sue letter. Subsequent to receiving the right to sue letter, Parsa amended the complaint to include the Title VII claims. Although this amended complaint did not mention the retaliation claim by reference, the court treats it as incorporated into the complaint. The court has previously dismissed Parsa's due process claim.

Parsa's claim of race and color discrimination finds its source in three statutory provisions: 42 U.S.C. § 1981 (protecting the right to make and enforce contracts); 42 U.S.C. § 1983 (enforcing the equal protection clause of the Fourteenth Amendment); and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*[2] The claims for unlawful retaliation as well as discrimination on the basis of gender and national origin are also brought under Title VII, for which 42 U.S.C. § 2000e-5(f)(3) specifically provides jurisdiction. Parsa's age discrimination claim is brought pursuant to 29 U.S.C. §§ 621-634, the Age Discrimination in Employment Act (ADEA). Finally, Parsa's First Amendment contention proceeds under the aegis of 42 U.S.C. § 1983.

Jurisdiction for these federal claims is provided by 28 U.S.C. § 1331. Defendant White's motion for summary judgment, having been argued and briefed by the parties is now before the court. Based upon a review of the evidence and arguments submitted by the parties, the court concludes for the reasons that follow that summary judgment is due to be granted as to each claim in favor of White.

I. FACTUAL BACKGROUND

At this stage of the proceedings, the facts, and all reasonable inferences to be drawn from those facts, are construed in the light most favorable to plaintiff. *Swint v.*

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[2] Although Parsa brings his Title VII claims against White in his individual as well as his official capacity, the Civil Rights Act of 1991 did not alter the Eleventh Circuit's ruling in *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991), that Title VII violations do not trigger individual liability. *Smith v. Capitol City Club of Montgomery*, 850 F. Supp. 976 (M.D. Ala. 1994) (Thompson, C.J.). Accordingly, summary judgment is granted as to the Title VII claims against White in his individual capacity.

The court has previously dismissed Parsa's ADEA claim against White in his individual capacity and has dismissed the § 1981 and § 1983 claims against White in his official capacity to the extent they request impermissible monetary damages.

City of Wadley, 5 F.3d 1435, 1439 (11th Cir. 1993). The following findings, therefore, do not necessarily describe the circumstances with accuracy.

Parsa first became employed by the State Finance Department in July 1990, when he was selected by the Fiance Director under Governor Guy Hunt, to be assistant director of the Department's Data Systems Management Division (DSMD). As assistant director of DSMD, Parsa was assigned by Governor Hunt and Hunt's Finance Director to "run a bunch of agencies, Capitol Police, service division." He was also in charge of all the state buildings, and designed and was in charge of the security system of all buildings in the state capitol office complex. He also created a five-year plan, as required by law, for information systems for the state government. In that capacity, he oversaw operations; decided who would have access to the computer, what the security would be, and what the rates would be; interacted with the federal government and oversaw compliance with federal requirements by DSMD and its "customers;" and exercised general managerial oversight.

On August 27, 1992, the same date on which he requested that Parsa be provisionally appointed as DSMD Director, Hunt's Acting Finance Director, James Rowell, also requested the State Personnel Department to create a promotional register to be used in making the appointment to the position of DSMD Director. At then Director Rowell's later request, the Personnel Department ultimately created—and the DSMD Director position was ultimately filled from—an open competitive register.[8]

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[8] A promotional register is limited to state employees who meet the specific qualifications; an open competitive register can include applicants who are not presently state employees. Deposition of Douglas Lunsford (May 23, 1994) at 12. Rowell, in fact, ultimately requested an open competitive register for the DSMD Director position precisely because he did not wish to prevent certain specified persons outside the state merit system from applying.

Created by statute, the Data Systems Management Division was developed to "plan and control the operation of data processing within state government." *See* Ala. Code § 41-4-220 (1975). By statute, and unlike most appointments, the Finance Director's appointment of the DSMD Director is required to be approved by the Governor. Ala. Code § 41-4-222 (1975). In general terms, the DSMD Director is responsible for all computer networking in state government.

The required range of knowledge and abilities specified for the position included knowledge of information systems, management principles, Alabama state government, the legislative process, information sources, and state laws. Additionally, candidates were required to have the ability to respond quickly, to communicate orally and in writing, and to comprehend policies. As to the "political" nature of the job, Rowell elaborated:

> [T]he person in that job has to display political astuteness. You have to know how to deal with the Legislature. You have to deal with Cabinet members. You have to be aware of the political environment that you're operating in. You can't remove politics from state government, therefore you have to work with it.

Rowell depo. at 123.

Parsa's appointment as DSMD Director was a provisional one. By statute, a provisional appointment may not exceed 156 working days. Ala. Code §§§ 36-26-2 (14), 36-26-17, 36-26-18(e) (1975). A provisional appointment can be canceled at any time, and there is no legal requirement that a provisional appointment be made permanent; moreover, state law prohibits making successive appointments of a provisional appointee. Ala. Code § 36-26-18(e).

State Personnel Director Ballard explained the restrictions on provisional appointments as follows:

> The rules are such that a provisional appointment can be used to fill a vacancy when the appointing authority has a need for the job to be done and there is no valid viable register for him to use. The provisional appointee must then compete against other applicants and must come out in the top ten, not behind a black[4] . . . in order to be appointed to the position and must be selected by the appointing authority.

Ballard depo. at 86. There is no requirement that the person ranked highest on the certification of eligibles be appointed; any person within the top ten is eligible for the position. The provisional appointee does not gain any advantage over other applicants by virtue of being a provisional appointee. Indeed, Parsa concedes that his provisional appointment did not entitle him to the permanent appointment. Parsa depo. at 35; McGee depo. at 27 (concession by Parsa's counsel).

In response to then Director Rowell's request for a register, the state Personnel Department worked with Rowell (acting as a subject matter expert) in identifying the knowledge, skills, and abilities necessary to perform the position of DSMD Director. The Personnel Department also performed a job analysis of the position, prepared a job analysis report, and generated a job description. By announcement dated March 31, 1993, the State Personnel Department announced the establishment of an

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[4] By remedial order of this court in *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970) (Johnson, J.) an appointing authority may not by-pass a black applicant on a certificate of eligibles to select a white applicant who appears lower on that certification. *Id.* at 1090-92. The decree allows a white applicant to be bypassed in favor of a black applicant who ranks lower on the certificate of eligibles, and it allows a white aplicant to be promoted over a higher-ranking white applicant. *Id.* Indeed, Parsa was ranked third on the certified list of eligibles when Rowell selected his as assistant director of DSMD in 1990. Rowell depo. at 138-39; Parsa depo. at 40-43, 49.

open competitive register for the position of DSMD Director. The announcement specified that all applications and behavioral questionnaries "must be returned to the State Personnel Department . . . by the close of business on April 19, 1993." The application deadline expired before Governor Folsom was sworn in as Governor, and thus before Mr. White assumed the position of Finance Director in the Folsom Administration.

In response to the job announcement, sixteen applicants were accepted by the Personnel Department as qualified for the position of DSMD Director. Among these applicants were plaintiff Parsa; Roderick Benton, a then fifty-nine-year-old white male, who had twice served as assistant director of DSMD and was Parsa's immediate predecessor as acting director of DSMD; and Jacquelyn Patillo, a then thirty-three-year-old black female. All three of these applicants submitted their applications by the April 19, 1993 deadline.

On April 22, 1993, Governor Hunt was convicted of felony ethics charges and stepped down as Governor; Lt. Governor Folsom was sworn in as Governor that same day. A few days later, on or about April 27, 1993, Mr. White was appointed and took office as Finance Director. The same day, newly-appointed Finance Director White (who is black) received a letter from Charlie D. Waldrep (who is white), who was writing White as the chief of now Governor Folsom's transition team.

In that letter, transition chief Waldrep requested the immediate cancellation of the provisional appointment of Parsa as Director of DSMD, and the transfer from Parsa of all of the electronic security system, including but not limited to all hardware, software, operating funds, and personnel to State Capitol Police Chief Cecil Humphrey. Waldrep also requested the immediate cancellation of the provisional appointments of Rebecca Hall as Security Systems Administrator, and Roger Owens as Capitol Police Administrator. The letter was addressed to Finance Di-

rector White because all of these persons were employees of the Department of Finance. It was Waldrep's opinion, as Chief of Governor Folsom's transition effort, that those personnel changes were necessary for the smooth and orderly transition to the new Folsom Administration. At that time, White did not know any of the four, i.e., Parsa, Owens, Hall and Humphrey.

More specifically, the transition team was deeply concerned about breaches of security and possible destruction of documents deemed vital to a smooth transition. Waldrep Affidavit at 2. Humphrey had advised Waldrep that Parsa was in charge of the security system for the entire State office complex. Waldrep testified that Dennis Nabors, former Governor Hunt's outgoing chief of staff, had advised him that Parsa was in charge of the State office complex security ssytem, as well as the computer system for the State, and had expressed the opinion to Waldrep that Parsa may not serve the new Folsom Administration well because of his friendship to Governor Hunt's son and his loyalty to the Hunt administration. Although Hunt had stepped down as Governor upon his trial court conviction, he was appealing his conviction and was insisting on his right to reinstatement as Governor. Chief of Transition Waldrep followed up his letter to White calling for the cancellation of Parsa's provisional appointment with a conversation with White that same afternoon.

In response to the April 27th letter from Chief of Transition Waldrep and the follow-up conversation, Finance Director White indicated he would look into it. Exactly what was said by Waldrep to White is unclear, but it is clear that Waldrep communicated his strong opposition to Parsa's appointment as Director of DSMD. The following day, White advised Chief of Transition Waldrep by letter that the provisional appointment of Rebecca Owens had been canceled, but that he would review the others before taking action. By letter dated

July 10, 1993, White canceled Parsa's provisional appointment.

On June 14, 1993, defendant Ballard had certified the ten applicants with the highest scores and issued a certification of eligibles for the DSMD Director position. On that list, Parsa was listed first; Benton, third; and Patillo, tenth. If veteran's preference consideration is removed, Patillo's resulting converted score placed her eighth on the list. Harmon depo. at 103-06.

In making his selection for DSMD Director, White reviewed the applications of all persons on the certificate of eligibles, but studied in detail those of Rod Benton and Patillo only, and interviewed only those two applicants. Rowell, as the outgoing acting Finance Director in the Hunt Administration, recommended Parsa for the position notwithstanding Parsa's removal from the provisional appointment. According to White, he did not even consider Parsa for the position because of Waldrep's opposition to Parsa's appointment.

White's first choice for the DSMD Director position was Rod Benton. However, when White offered the position to Benton, the sixty-year-old Benton indicated his wife had wanted him to retire. He told White he planned to retire soon and he suggested White hire someone who was not going to retire soon. He turned down White's offer.

After Benton, Patillo was White's second choice. Accordingly, by letter dated July 2, 1993, White appointed Patillo to the position of DSMD Director effective July 26, 1993. Parsa returned to his position as assistant DSMD Director, a position that he continues to occupy.

II. DISCUSSION

A. Standard for Summary Judgment

Rule 56(C) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." A district court must consider "all the evidence in the light most favorable to the non-moving party . . . and resolve all reasonable doubts in favor of the non-moving party." *Earley v. Champion International Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990) (citations and internal quotations omitted). Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The non-moving party need make this showing only after the moving party has satisfied its burden. *Clark v. Coates & Clark, Inc.*, 939 F.2d 604, 608 (11th Cir. 1991).

The necessity of determining whether qualified immunity is due to be granted as to the claims against White in his individual capacity adds an additional, frequently confounding dimension to the summary judgment inquiry. The standards implicated upon an evaluation of whether White is entitled to summary judgment on the issue of qualified immunity is profitably discussed at this juncture. These standards govern whether White will be liable in his individual capacity for violations of 42 U.S.C. §§ 1981 & 1983.

Section 1983 provides a civil remedial vehicle for persons claiming violations of their rights secured by either the Constitution or by federal laws, "broadly encompass-[ing] violations of federal as well as constitutional law." *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Plaintiffs' § 1983 action is grounded upon allegations that White violated the First Amendment of the U.S. Constitution

as well as the equal protection clause of the Fourteenth Amendment. Parsa also alleges that his rights under § 1981 were violated.

White maintains that his actions violated no constitutional or statutory requirement, and that qualified immunity protects him from this lawsuit in his individual capacity. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Because a "reasonably competent public official should know the law governing his conduct," *id.* at 818-19, the violation of clearly established law will defeat the immunity defense. *Anderson v. Creighton*, 483 U.S. 635 (1987), explained that qualified immunity is a fact-sensitive inquiry, such that the "contours of the right [at issue] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 639.

Harlow's objective reasonableness test is applied through a two-part analysis:

> (1) The defendant public official must first prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred."
>
> (2) Once the defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the plaintiff to show lack of good faith on the defendant's part. This burden is met by proof demonstrating that the defendant public official's actions "violated clearly established constitutional law."

Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988) (quoting *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th

Cir. 1983)). Defendant White has easily met his burden of demonstrating that he was acting within his discretionary authority. Because defendant White denies that he violated any of Parsa's clearly established rights, the burden now shifts to Parsa to show that the legal norms allegedly violated by White were clearly established at the time in question, as well as to marshal "evidence sufficient to create a genuine issue of fact as to whether the defendant engaged in conduct violative of the rights guaranteed by clearly established law." *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1503 (11th Cir. 1990); *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990).

B. Discrimination on the Basis of Race or Color

It is important to clarify that this case does not involve a claim by defendant White that race was a permissible factor considered in the selection process. Although adherence to a valid affirmative action plan will supply a defendant with a legitimate, "nondiscriminatory rationale" for its employment decision, *Johnson v. Transportation Agency*, 480 U.S. 616, 626 (1987), defendant White has not advanced any such a defense. Each of White's proffered defenses for not hiring Parsa rests upon race-neutral grounds. In his deposition, White stated that he did not use race as a factor in making promotions or appointments and he did not believe that state or federal law authorized him to do so.[5] White depo. at

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[5] Significantly, White does not rely on the *Frazer* decree as a justification for race-conscious practices. The *Frazer* decree was created when Judge Johnson found evidence of a pattern and practice of racial discrimination so appalling in its abundance in the hiring practices of the State of Alabama that he determined it "necessary to enter a detailed and specific decree which will not only prohibit discrimination but which will also prescribe procedures designed to prevent discrimination in the future and to *correct the effects of past discrimination.*" *Frazer*, 317 F. Supp. at 1090 (emphasis added). The import of the italicized clause, when read against the totality of the discrimination against blacks

97-99. Accordingly, the standards governing resolution of this Title VII case are identical to the standards governing cases in which the plaintiff is not a Caucasian. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279-80 (1976).

1. Plaintiff's Theory of Pretext

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), delineates the following elements that Parsa must show to establish a prima facie case of employment discrimination: (1) that he is a member of a protected group; (2) that he was qualified for the job; (3) that he was rejected; and (4) that the job remained available and was later filled by another applicant.[6] *Id.* at 252-53; *see also McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). Once the prima facie case is established, the burden is shifted to the defendant to produce evidence that the adverse employment action was taken for a nondiscriminatory reason. *Hicks*, 113 S. Ct. at 2747. Determining whether a defendant has met this burden of production "can involve no credibility assessment." *Id.* at 2748. If the defendant met this burden, the plaintiff must not merely demonstrate that defendant's reasons were pretextual, but he must persuade the fact-finder that the defendant intentionally discriminated against him on account of race. *Id.* A demonstration of

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everywhere in evidence in the State's hiring practices, makes it plausible to construe the decree as operating as a limited affirmative action device that authorized the race-conscious hiring of minorities as a means of rectifying the effects of past discrimination. Thus, arguably, a public official interpreting the decree to authorize race-conscious employment decisions would at the very least be entitled to qualified immunity.

[6] The Supreme Court has never definitively stated that the person selected for the position must be a member of a group different from the plaintiff's. *See St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2758 n.1 (1993) (Souter, J., dissenting). Nonetheless, it is evident under the facts presented here that had Benton accepted the job, Parsa would have no claim.

pretext, coupled with an establishment of a prima facie case, will suffice to permit the factfinder to conclude that intentional discrimination has occurred. *Id.* at 2749; *Batey v. Stone,* 24 F.3d 1330, 1334, 1335 (11th Cir. 1994).

Parsa has easily established a prima facie case. He is a Caucasian whose qualifications for a position to which he was denied a promotion are undisputed. In addition, an African-American woman ultimately was selected for the job rather than Parsa.

White has articulated race-neutral justifications for the employment decision, which carry his burden of production. Specifically, White knew that the initial transition chief, Waldrep, strongly opposed Parsa's permanent appointment and for this reason he did not consider Parsa's appointment. In response, Parsa contends that Waldrep's opposition to Parsa's appointment, though such opposition was real, is merely a pretext for White's racial discrimination in ultimately selecting a black woman.

Even if the court accepts Parsa's contention that race played a part in Patillo's selection, this fact is not evidence that *Parsa* was rejected for racial reasons. When the record is read most favorably to Parsa there is undisputed evidence that Waltrep was adamantly opposed to Parsa and that Waldrep communicated this fact to White and to others. The evidence of White's primary non-discriminatory rationale is undisputed. White states that had he recommended Parsa, a prolonged battle with Waldrep (Folsom's closest advisor) would have been necessary in order to give Parsa even a chance of approval, and White reasonably insists that he was under no obligation to expend his energies opposing Waldrep on Parsa's behalf even if he had a basis for challenging Wallrep's conclusion that Parsa should not be appointed for security reasons. White had no basis. Therefore, the core legal question that will determine the outcome of this case is whether White can be held liable to Parsa for race discrimination for acquiescing to the position of the initial

Chief of Transition that Parsa should not be appointed for security reasons, even if White ultimately appoints a black and such appointment is motivated in part by racial reasons. The court thinks the answer to the question is no.

As Chief of Transition, Waldrep was in charge of the transition team's efforts to ensure an orderly flow of government, including filling vacancies, hiring staff, and evaluating applicants for cabinet level positions. According to John Tanner, Transition Director and another Folsom confidant, Waldrep was the transition team member primarily responsible for personnel matters. Tanner depo. at 35. Waldrep has been close friends with the Governor since 1967. *Id.* at 11. Although Waldrep was no longer Chief of Transition and not yet Chief of Staff when White finalized the permanent appointment for DSMD Director in July 1993, Waldrep was routinely consulted by the Folsom administration on matters concerning personnel and appointments. Waldrep depo. at 43. Tanner, as Transition Director, maintained daily contact with Waldrep when Waldrep went back to private practice. Tanner depo. at 40.

As previously noted, Waldrep had instructed White by letter in late April to remove Parsa from his provisional post, and in July 1993, White carried out this instruction. Waldrep wrote this letter based on information he stated he received from Dennis Nabors and State Capitol Police Chief Cecil Humphrey. Waldrep expressed concern to Humphrey about media reports that the outgoing Hunt administration had shredded documents, and about security in general. Waldrep depo. at 16-17. According to Waldrep,

> Chief Humphrey expressed to me that he was concerned about . . . Doctor Parsa and whether or not he could be trusted, be loyal to the Folsom administration. And he informed me that Dr. Parsa had a provisional appointment which would put him in charge of the DSMD. And at that time I didn't know what the DSMD was.

> And he told me that DSMD had the security cards for all of the egress and ingress from the building; that they were over the telephone system, the computers; that it was a very sensitive matter. And he told me the reason that he would question Doctor Parsa's loyalty to the Folsom administration would be because of his very close association with Keith Hunt and Governor Hunt. And that Governor Hunt had made this appointment for him to be over DSMD and that's how he got that, and that I needed to be aware of it.

Waldrep depo. at 18-19.

Waldrep also stated that Humphrey conveyed concerns regarding two other employees, Roger Owens and Rebecca Hall. Waldrep states that he was told by Humphrey that "all of these people were folks that were in their position as a result of Governor Hunt, and that they were in sensitive security positions, and that he questioned whether or not they would be loyal to the Folsom administration." Waldrep depo. at 20. Waldrep states that he was advised that none of these three employees could be treated by the Folsom administration. *Id.* at 21.[7]

Concerns were also raised about Parsa to Waldrep by Dennis Nabors, Hunt's outgoing Chief of Staff. Nabors told Waldrep that Parsa was very close to the former governor and his son, and that "[Parsa's] star was on the rise as far as the Hunt administration was concerned." Waldrep depo., at 21. Nabors indicated he would "have real questions about whether or not Doctor Parsa could maintain loyalty to the Folsom administration while there was the thought that Governor Hunt and Keith would

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[7] Humphrey denies making any statements adverse to Parsa, Owens, or Hall. Humphrey Affidavit. Even if Humphrey is believed and a reasonable jury determined that Waldrep was not a credible witness, only Waldrop's statements to *White* are probative of White's contention that he did not consider Parsa because of Waldrep's articulated strong opposition to Parsa's appointment.

be returning to the Governor's Office." Waldrep depo. at 32. Upon hearing these concerns from Humphrey and Nabors, Waldrep sent White the April 27, 1993 letter recommending that Parsa's provisional appointment be revoked and that all of the electronic security systems be transferred to Humphrey's control.

Waldrep's description of his own beliefs as well as his statement that Folsom would have contacted him had Parsa been recommended are corroborated by John Tanner, one of Folsom's confidants who was an avid champion of Parsa's candidacy. There was no doubt in Tanner's mind that Parsa had political problems staying in the Director's position. Tanner depo. at 48. Tanner stated that convincing the Governor to approve Parsa would have been "difficult because of [Waldrep's] opposition." *Id.* at 25. Tanner acknowledged that Waldrep was adamant in his opposition to Parsa, and that Waldrep had expressed the intensity of his position in several disagreements he had with Tanner. *Id.* at 38. Tanner in fact referred to his disagreement with Waldrep over Parsa as a "battle" that began to cause "hard feelings." *Id.* at 41. When it became evident that he would not succeed in preserving Parsa's appointment to the Director's post, Tanner ceased his lobbying efforts. *Id.* at 40-41.

The circumstances surrounding the transition from the Hunt administration to the Folsom administration give some basis for Waldrep's concerns about the political loyalty of officials previously appointed to high positions in the Hunt administration. When Folsom was sworn in, Hunt had been convicted of felony ethics charges. The Folsom administration was deeply concerned about the possibility of security breaches and the destruction of official documents. Reports of document shredding spread rapidly to the members of the new administration. Because there remained the possibility that Hunt would be reinstated as governor if his conviction was overturned on appeal, Folsom's administration was worried that high-level government employees who had developed strong

loyalties over the course of Hunt's nearly two terms in office posed a substantial risk of being disloyal to the new administration.

As noted, White did not even consider Parsa for permanent appointment after being told by then Chief of Transition Waldrep to cancel Parsa's provisional appointment. Parsa contends despite the unyielding opposition of Waldrep to Parsa's appointment, White might have successfully insisted to Governor Folsom that he overrule Waldrep and appoint Parsa. But there is no evidence that White possessed information that Waldrep's concerns regarding Parsa's lack of loyalty to the new administration were inaccurate. The concerns about Parsa with respect to his loyalty to the Folsom administration were transmitted to Governor Folsom when White recommended Patillo for the position. Moreover, White was surely not obligated to engage in an advocacy effort carried to Governor Folsom in the hope that he could persuade the Governor to overrule Waldrep's opposition. No witness has indicated that White or Waldrep ever mentioned race, gender, national origin, or age in any conversation concerning Parsa. Therefore, Parsa's claim that Waldrep's opposition to Parsa and White's acquiescence in Waldrep's recommendation is pretextual must fail.

It logically follows, for purposes of evaluating the qualified immunity claims, that no reasonable factfinder could determine other than "that a person in . . . [White's] position could reasonably believe" that he had no obligation to oppose Waldrep's adamant opposition to Parsa. *Bates v. Hunt*, 3 F.3d 374, 379 n.9 (11th Cir. 1993). White is therefore entitled to qualified immunity as to the race discrimination claims of Parsa with respect to the failure to appoint Parsa.

2. Plaintiff's Mixed Motives Theory

The Civil Rights Act of 1991 repudiated the rule of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989),

which had held that an employer who had acted partly for discretionary reasons and partly for nondiscriminatory reasons could avoid liability by showing, by a preponderance of the evidence, that the same employment action would have occurred had there been no discriminatory intent. *See* 42 U.S.C. § 2000e-2(m) (Supp. IV 1992). This new provision provides that an intervening legitimate race-neutral motive cannot absolve an employer of liability once discrimination has been shown to be a motivating factor in the employment decision.[8] However, a plaintiff cannot succeed upon a mixed motives theory in the Eleventh Circuit unless the plaintiff produces *direct* evidence[9] of intentional discrimination. *Burns v. Gadsden State Community College*, 908 F.2d 1512, 1518 (11th Cir. 1990) (per curiam).

Plaintiff himself correctly states that he is unable to produce any "smoking gun" statements evidencing discriminatory animus that are attributable to Dr. White. Plaintiff's Brief in Opposition to Motion for Summary Judgment at 9 (July 23, 1994). None of the comments made by White proves that White used race as a factor in his decision not to recommend Parsa's appointment. The fact that White initially offered the position to a white male, Roderick Benton, does not support plaintiff's theory that Parsa was rejected in order to appoint a black. Thus, plaintiff's Title VII claim that he was discriminated on the basis of race or color cannot survive

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[8] Specifically, the Civil Rights Act of 1991 states: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

[9] Direct evidence is evidence that powers the existence of a disputed fact without inference, presumption, or the use of any other fact. BLACK'S LAW DICTIONARY 460 (6th ed. 1990). Circumstantial evidence, on the other hand, requires the factfinder to make inferences in order to establish the disputed fact. *Id.* at 243.

the motion for summary judgment under either a mixed motives theory or a pretext theory.[10]

C. Age Discrimination

Plaintiff has elected to establish a prima facie violation of the ADEA by using circumstantial evidence to show (1) that he was in a protected age group at the time of the discrimination, (2) that he was qualified for his current position at the time of his termination, (3) that plaintiff was replaced with a person outside the protected group; and (4) that plaintiff was qualified for the position. *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1990). Although Parsa has satisfied each element of the prima facie case, he has failed to meet his burden of proving that defendant's proffered nondiscriminatory reasons are mere pretexts for discrimination. Pretext may be proven by showing either that illegitimate concerns about age more likely motivated the employer or by showing that the employer's proffered reasons are not worthy of credence. *Corbin v. Southland International Trucks*, 25 F.3d 1545 (July 15, 1994).

The only evidence Parsa offers to indicate that age informed the promotional decision is the remark made by Benton, a sixty-year-old male, after he declined an offer of the Director's job. Apparently Benton recommended to White that he select a person to direct DSMD who was not ready for retirement. White depo. at 78-79. Even if such a statement is interpreted as a suggestion to hire someone younger than Parsa (a dubious interpretation at best), the statement, unaccompanied by a showing that White somehow adopted or endorsed its message, is not probative as to *White's* intentions. The court concludes that plaintiff has failed to present evidence on the issue

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[10] Plaintiff's admission that his claim of gender discrimination is too insubstantial to pursue entitles White to summary judgment on that claim. Likewise, the court finds that plaintiff's Title VII claims based upon national origin and retaliation are without merit.

of age discrimination "significantly probative" to avoid summary judgment. *Young v. General Foods Corp.*, 840 F.2d 825, 829 (1988).

D. First Amendment Claim [11]

For purposes of this political patronage claim, plaintiff asks the court to accept White's assertion that he did not consider appointing Parsa because Parsa had been loyal to former Governor Hunt and would therefore potentially be disloyal and untrustworthy with regard to his work for Governor Folsom. Plaintiff asserts that this race-neutral reason abridges Parsa's First Amendment rights.

The Supreme Court has held that under certain circumstances the First Amendment rights of policymaking or confidential public employees may be abridged. *See Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. In *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), the court construed *Branti* to require the employer to "show that the required political support or affiliation is relevant to the job." *Id.* at 1190. The Eleventh Circuit has examined the nature of an employee's duties, and the discretion attendant to those duties, in evaluating patronage claims. *See Ray v. City of Leeds*, 837 F.2d 1542, 1544-

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[11] It was not until six weeks after the initial pretrial conference and two-and-a-half weeks before the scheduled trial date that plaintiff has attempted to add the political patronage claim. Ordinarily, defendant would be granted time to file an answer and pursue discovery before the court takes the matter under submission. However, because the court concludes that the record is sufficiently developed to dispose of the claim in favor of defendant, the court will address the claim on the merits.

45 (11th Cir. 1988); *Stegmaier v. Trammel*, 597 F.2d 1027 (5th Cir. 1979).

There can be no dispute that the Director of DSMD occupies a political, policymaking position that is entrusted with maintaining the security of numerous confidential documents affecting every area of state government. Indeed, the Director is in complete control of the security system for the entire State office complex. Furthermore, Rowell testified that the Director, who has to deal with the legislature and with cabinet members, must possess the facility to understand the mechanics of state government in Alabama. Rowell depo. at 123. It would clearly be of paramount importance that the Folsom administration be able to trust beyond doubt the loyalty of the Director of DSMD.[12]

The highly sensitive nature of the job being undisputed and explained by a plethora of witnesses in excruciating detail, this case is fairly well controlled by *Trammel*, which upheld a circuit clerk's ability to dismiss a deputy clerk, despite the fact that the deputy clerk did not "stand in a confidential relationship to a policymaking process." *Trammel*, 597 F.2d at 1040. The court held that the circuit clerk's responsibility for the security of public documents (a responsibility only a fraction of

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[12] Specifically, former Acting Director Rowell described the job responsibilities of DSMD Director as follows:

> The job responsibilities are basically to operate the Division of Data Systems Management to provide computer services to all of the users; for several years it was to provide communication services to all users; to supply systems and programming services to all users; and also to advise the Governor and Finance Director on problems involving . . . Cabinet members; advise the Legislature on activities; answer any questions or solve any problems that the Legislature or the Cabinet or the Governor may have in relation to data processing. That's . . . a technical, management, and political type of job.

Rowell depo. at 20-21.

that possessed by the DSMD Director) entitled the clerk to select a *deputy*[13] "in whom he has total trust and confidence and from whom he can expect, without question, undivided loyalty." *Id.* The patronage dismissal was allowed even without a showing that the dismissed clerk was incompetent, dishonest, or lacked integrity; it was the nature of the clerk's duties that made him "justified in selecting a [d]eputy [c]lerk of his own choice." *Id.*

In the present case, the security concerns of Folsom's transition team were substantial. The fact that no one in state government knew whether Hunt would return to office gave Waldrep reasonable grounds to doubt the reliability of Hunt loyalties. Not surprisingly, Nabors, an advisor to Hunt, indicated that he would "have real questions about whether or not Doctor Parsa could maintain loyalty to the Folsom administration while there was the thought that Governor Hunt and Keith would be returning to the Governor's Office." Waldrep depo. at 32. Such concerns prompted Waldrep to send the April 27, 1993 letter recommending that Parsa's provisional appointment be revoked and that all of the electronic security systems be transferred to Humphrey's control. Certainly it was not inappropriate for the Folsom administration to take all possible precautions to prevent the destruction of documents or to protect the new administration by appointing people to key positions with undivided loyalty to it. Neither individual nor official liability will attach to White on this claim.

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[13] In *Trammel*, the deputy clerk claimed that she could not be dismissed for patronage purposes. Parsa's job is, of course, more analogous to the clerk's than to the deputy clerk's. *Trammel* merely agonized over the propriety of firing the deputy clerk on patronage grounds; the ability to fire the clerk, if the position had been one of appointment, was taken for granted. Thus, Parsa's ability to prevail on this claim is inversely proportional to the authority and power he possesses; in other words, his claim is not viable.

III. CONCLUSION

For the reasons stated herein, summary judgment is due to granted in favor of defendant White on all claims in both his individual and official capacity. Because defendant Ballard's liability is wholly derivative of defendant White's, summary judgment is due to be granted in favor of defendant Ballard as well. An order will be entered in accordance with this memorandum opinion.

DONE this 22nd day of August, 1994.

/s/ Truman Hobbs
United States District Judge

APPENDIX C

[Filed Aug. 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 93-H-1345-N

JOHN H. PARSA,
Plaintiff

vs.

JAMES C. WHITE, SR., ETC.; *et al.*,
Defendants

ORDER

In accordance with the attached memorandum opinion entered on this date, summary judgment is entered in favor of defendants White and Ballard in both their individual and official capacities on all claims raised by plaintiff. The parties are to bear their own costs.

DONE this 22nd day of August, 1994.

/s/ Truman Hobbs
United States District Judge

APPENDIX D

[Filed Sept. 9, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 93-H-1345-N

JOHN H. PARSA,
Plaintiff

vs.

JAMES C. WHITE, SR., ETC.; *et al.*,
Defendants

ORDER

On September 6, 1994, plaintiff timely filed a motion under Rules 59(e) and 52(b) to alter or amend this court's judgment of August 22, 1994 and to amend this court's findings. Items 3, 6, 9, and 10 challenge the court's application of legal principles. The court is not persuaded to alter its analysis. The remainder of the items urge the court to modify its factual findings, but the court is not persuaded to take this action either. Accordingly, plaintiff's motion is DENIED.

DONE this 9th day of September, 1994.

/s/ Truman Hobbs
United States District Judge

APPENDIX E

[Filed Oct. 11, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-6861

JOHN A. PARSA,
Plaintiff-Appellant,

versus

JAMES C. WHITE, SR., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, HATCHETT, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Ap-

pellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

Supreme Court, U.S.
FILED
FEB 12
CLERK

No. 95-1106

In The

Supreme Court of the United States

October Term, 1995

JOHN H. PARSA,

Petitioner,

vs.

JAMES C. WHITE, JR., individually and in his official capacity as Director of the Finance Department of the State of Alabama; and HALYCON V. BALLARD, in her official capacity as the Director of the Personnel Department of the State of Alabama,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS JAMES C. WHITE, JR. AND HALYCON V. BALLARD

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT THE DISTRICT COURT APPLIED THE PROPER LEGAL STANDARDS AND RENDERED THE CORRECT JUDGMENT?

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b) Respondents represent that the parties to this brief are all named in the caption of this case. To the knowledge of the Respondents, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit was entered on August 8, 1995 (App. 1a to Petition) and the order denying rehearing and rehearing en banc was entered on October 11, 1995 (App. 27a to Petition). Unpublished decisions of the United States District Court for the M.D. of Alabama were entered on August 22, 1994 (App. 2a to Petition) and September 9, 1994 (App. 26a to Petition).

OBJECTION TO JURISDICTION

Respondents submit that this Court does not have jurisdiction to review the order in question by writ of certiorari because none of the possible questions presented by the Petitioner concern conflicting decisions of courts of appeal or state courts nor this Court. This objection is discussed further *infra*.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Lower Court

This action was initially filed in the United States District Court for the Middle District of Alabama by Plaintiff/Petitioner John H. Parsa ("Parsa") against James C. White, Sr., individually, and in his official capacity as the Director of the Finance Department of the State of Alabama ("White"), and Halycon V. Ballard, in her official capacity as Director of the Personnel Department of

the State of Alabama ("Ballard"). The claim against Ballard is asserted in her official capacity only in order to achieve any injunctive relief granted. Parsa's Complaint against White, as amended, sought redress under 42 U.S.C. § 1983, 42 U.S.C. § 1981, the Age Discrimination in Employment Act ("ADEA") and Title VII of the Civil Rights Act of 1964, based on race, sex, age and national origin discrimination. Parsa's claims arose out of his failure to receive a promotion to the position of Director of the Data Systems Management Division ("DSMD"). Appellees generally agree with the Course of Proceedings and Disposition Statement set forth in Petitioner's Brief, with the following additions.

Since the Appeal was filed, Forest H. ("Fob") James was elected and sworn in as Governor of the State of Alabama, replacing Governor James Folsom. With the change in administration, Jimmy H. Baker was appointed Acting Director of the Finance Department of the State of Alabama, replacing White. As of this date, Phillip Williams has been appointed Finance Director. White remains as a defendant to those claims alleged against him in his individual capacity. For ease of reference, the claims alleged against the Finance Director in the official capacity and in the individual capacity shall continue to be referred to collectively as against White.

Since the primary focus of Parsa's Petition is on his alleged First Amendment claim, a more detailed explanation of the Course of Proceedings in this regard is appropriate. Parsa's original Complaint, as amended, made no reference to an abridgement of his First Amendment rights. (R 1-1). His first pleading in the case raising this issue was not filed until approximately eight months

later, on August 5, 1994, via a Motion for Leave to Add a Contention to the Pretrial Order. (R 2-41). This motion was filed approximately six weeks after the final pretrial conference and approximately two and one-half weeks before the scheduled start of the trial and after White's Motion for Summary Judgment had been briefed, argued and additional discovery allowed. More importantly, no amended complaint was filed by Parsa raising the First Amendment issues. White responded with a Motion to Strike (R 2-46) and no discovery was conducted on this issue. The district court recognized the untimeliness of the amendment but, nevertheless, felt the record was sufficiently developed to dispose of the claim in favor of the defendant. (R 1-47-23, f.n. 11).

B. Statement of the Facts

White adopts the Factual Background contained in the Court's Memorandum Opinion. (R 2-47-2-9).

White takes strong issue with a misstatement of fact in Parsa's Petition, however. Parsa contends that *if* White had recommended Parsa to Governor Folsom, Folsom would have approved Parsa's selection. (Petition p. 9). Folsom attested otherwise.

Although White did not recommend Parsa for the permanent directorship appointment, it is uncontradicted that had White made such a recommendation, Waldrep would have been contacted and the matter would have been discussed with the Governor. (R 2-44, in separate envelope, Waldrep Depo. pp. 36-44; Tanner Depo. p. 42). What would have happened next is clear. Waldrep would have recommended to the Governor that Parsa not be

appointed. (R 2-44, in separate envelope, Waldrep Depo. pp. 44-46). Furthermore, the Governor would have listened to such recommendation. "[I]f Charlie Waldrep advised against Mr. Parsa in this case, I would have followed the advice of Mr. Waldrep and not approved the recommendation of Mr. Parsa if, in fact, Mr. Parsa had ever been presented to me for approval." (R 2-44, in separate envelope, Answers of James E. Folsom to questions submitted at 2; Folsom Depo. p. 6).

REASONS FOR DENYING THE WRIT

A. Petitioner has not complied with Supreme Court Rule 10 by stating a compelling reason for granting the petition for a writ of certiorari.

The Petitioner has failed to state a compelling reason for granting the writ of certiorari in contravention of Supreme Court Rule 10. Petitioner has made no showing that the Eleventh Circuit's decision is in conflict with the decision of another United States Court of Appeals or is in conflict with relevant decisions of this Court.

Petitioner contends that the District Court erroneously relied on *Stegmaier v. Trammel*, 597 F.2d 1027 (5th Cir. 1979). However, there is no showing that *Stegmaier* conflicts with any other circuit court holdings or holdings of this Court. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

All of Petitioner's arguments consist of allegations of erroneous factual findings or assertions that a properly stated rule of law was misapplied. Therefore, the petition should be dismissed.

B. The United States Court of Appeals for the Eleventh Circuit correctly concluded that the district court applied the proper legal standards and rendered the correct judgment.

(1) The Eleventh Circuit's decision is correct under its holdings and the holdings of this Court.

The district court's decision is supported by the *Pickering/Connick* or *Elrod/Branti* tests enunciated by this Court. (*Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980)). The district court addressed Parsa's first amendment claim in the light of political patronage cases where this Court has held that under certain circumstances the first amendment rights of policymaking or confidential public employees may be abridged. The district court recognized that the highly sensitive nature of the data of the Director of DSMD was undisputed and "explained by a plethora of witnesses in excruciating detail," and found substantial security concerns for state government by the then governor. (R 2-47-24,25). "There can be no dispute that the Director of DSMD occupies a political, policymaking position that is entrusted with maintaining the security of numerous confidential documents affecting every area of state government." (R 2-47-24).

It is undisputed that the directorship was a high ranking position within state government. Parsa's assertion in argument that the directorship was one of "mid-management" is incorrect. Furthermore, Parsa's attempt to minimize the importance of the DSMD Director with the allegation that it was three steps removed from the Governor's office and two steps removed from White is not conclusive of the issue. This charting ignores the undisputed job description, duties and statutory mandate of the position.

Not every important policymaking and security conscious position in the myriad of Alabama state government will have the immediate ear of the Governor. This does not mean that the citizens of the state of Alabama cannot require that the "effective performance of the public office involved" require loyalty to the governor, or at the very least, an absence of disloyalty. This case does not involve, as Parsa argues, every highly responsible second or third level position in the state of Alabama, but rather a particular highly specialized, technical and security conscious position for which state law uniquely requires the Governor's approval before a director may be appointed. *Ala. Code* § 41-4-222.

It is clear that the Directorship position involves policymaking duties, relationships with a variety of government and elected officials and has access to extensive confidential information that is used by other policymaking individuals. The applicant's trustworthiness and loyalty to an administration are legitimate concerns for the effective performance of the office. The lower court's decision survives the *Branti/Elrod* test.

There is also precedent in a case such as this for applying the *Pickering/Connick* test. *See McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994) (Court applied all three tests); *Taylor v. Bartow County, GA*, 860 F. Supp. 1526 (N.D.Ga. 1994) (Court steadfastly applied *Pickering/Connick* test). *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), cited with approval in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), also supports the proposition that the *Pickering/Connick* test is applicable in this situation, noting that the *Elrod/Branti* test is more properly applied in a raw political patronage discharge and is not suited to cases of "personal, political loyalty."

> We do not believe that test [Elrod/Branti] is suited to the "personal, political loyalty" situation; it is too narrow. While it may adequately protect the only conceivable governmental interest and insuring same-party affiliation of a public employee, it is not flexible or broad enough to protect governmental interest in avoiding a variety of employee "expressions" involving specific insubordination or dereliction of duty having a "political" tinge, or, conceivably, deliberately giving a "political" cloak.

Jones, 727 F.2d at 1335, n.6.

It is clear that a public employee's protection from adverse action based on the public employee's speech and association is not absolute. As stated by the court in *Pickering* and followed by the Eleventh Circuit in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), the court must balance "the interest of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the

public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734. In making this determination, the Eleventh Circuit has adopted a three-pronged test.

> First the Court must determine whether the employee's speech can be fairly characterized as implicating a matter of "public concern." If so, the speech is constitutionally protected. Second, the plaintiff must show that the speech was a "substantial or motivating factor" in the employment decision. Third, when both these showings have been made, the Court will apply the balancing test set out in *Pickering* . . . to determine "whether the adverse employment decision was justified."

Maples v. Martin, 858 F.2d 1546, 1552 (11th Cir. 1988) (citations omitted).

As reviewed by the Eleventh Circuit in *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994):

> The Supreme Court has identified a number of factors for courts to consider when performing the balance: (1) whether the employee's exercising rights "impairs discipline by superiors or harmony among co-workers"; (2) whether the employee's exercising rights "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary"; and (3) whether the employee's exercising rights "impedes the performance of the [employee's] duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388, 107 S. Ct. at 2899 (citations omitted).
>
> The principle underlying the focus on these factors seems to be that the employer's interest will

> weigh more heavily in the *Pickering* balance the more closely the challenged employment action serves the employer's interest in the efficient and effective functioning of the office.

McCabe, 12 F.3d at 1570.

Other factors to be examined include whether the position of Director included the:

> power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, responsiveness to partisan politics and political leaders, responsibilities that are not well defined or are of broad scope, input into hiring decisions, supervision of employees, development of office policies and practices, and communication with the public . . .

Stott v. Martin, 783 F. Supp. 970, 982-983 (E.D.N.C. 1992) (Citations omitted).

Factors weighing on the employer's side are situations where the employee enjoyed a confidential relationship, policymaking authority, or extensive public contact on the employer's behalf. *Bates v. Hunt*, 3 F.3d 374 (11th Cir. 1993); *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992). Certainly, access to confidential information is a legitimate government concern weighing heavily in an employment consideration. Courts also consider speech that severely impedes the employee's own effectiveness and the effectiveness of his office. *Morales v. Stierheim*, 848 F.2d 1145, 1151 (11th Cir. 1988) (concluded that employee's own statement tilted *Pickering* test in favor of governmental interest); *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988) (Applying *Pickering* test, court

upheld transfer of university professor who offered letter disrupting working relationships, producing atmosphere of tension and prohibiting efficient administration of department).

The Eleventh Circuit has found that the ability to keep confidences weighs heavily in favor of the employer.

> Where loyalty to an employer and the ability to keep confidences are essential to the proper performance of public functions, the public employer's interest will weigh heavily if the employee's exercise of the right would compromise loyalty and confidentiality, because restricting those rights may be necessary to preserve the employer's interest in effective office functioning. . . . For this reason, "[w]hen close working relationships are essential to fulfilling public responsibilities," the court has accorded "a wide degree of deference to the employer's judgment." *Connick*, 461 U.S. at 151-52, 103 S. Ct. at 1692.

McCabe, 12 F.3d at 1570-71. *See also McDaniel v. Woodward*, 886 F.2d 311 (11th Cir. 1989) (Confidential secretary to state court judge); *Ray v. City of Leeds*, 837 F.2d 1542, 1544 (11th Cir. 1988); *Stegmaier v. Trammel*, 597 F.2d 1027, 1038-40 (5th Cir. 1979).

Parsa's loss in this matter is also a balance to be factored. This was a promotional decision. *Parsa was not terminated or demoted*. Parsa was not transferred to a less desirable position, except that he was returned to the previous assistant director position which he held prior to his provisional appointment. Parsa is still employed at the Department of Finance. He has not been caused to

lose his livelihood, pension, retirement or other state benefits which he may claim. Parsa is not tainted or stigmatized. The associational loss in question is also not great. This was not a family situation. This was not a political speech situation. This was an intimate association with a former governor. Clearly, Parsa's losses, if any, in this case do not outweigh the State's interest in conducting the business of the Department.

(2) There was no evidence that White's articulated legitimate non-discriminatory reasons were pretextual.

White's evidence of legitimate nondiscrimatory reasons is ample and is clearly set out in the lower court's opinion. Parsa's evidence of redressable discrimination is conspicuously absent and is limited to only a vague recollection to a post-selection comment regarding "social justice" as a basis for White's selection of another candidate for the promotion as opposed to a reason for the non-selection of Parsa. As the lower court found, this is not sufficient. Parsa clearly bears the burden of showing that these proffered reasons are mere pretext.

Parsa incorrectly characterizes White's actions in bypassing him as being based solely on Parsa's association with the former governor. In fact, White's testimony was that he did not reasonably believe that an appointment of Parsa to the position, even if recommended, *would have been approved by the Governor.* (R 2-43-1). It is undisputed in *Ala. Code* § 41-4-222 that the appointment of the director must be approved by the Governor. (Parsa Add. 6). It is certainly reasonable for White to believe that

Parsa, even if recommended, would not have been approved by the Governor, especially with an objection coming from Chief of Staff Waldrep. It is certainly reasonable for White to desire to avoid a hiring controversy within the new administration. The Court, while not bound by the legislature, can certainly read into *Ala. Code* § 41-4-222 the legislature's finding that the DSMD Director's position was sensitive enough to require the approval of the Governor when numerous other "mid-management" positions did not.

Parsa failed to show any direct or circumstantial evidence of any discriminatory statement or act by White. Without such evidence, Parsa's direct claims and his mixed motive claims were due to be summarily dismissed.

(3) White is entitled to the protection of the defense of qualified immunity.

It is undisputed that White, in selecting a candidate for the permanent directorship position out of ten names submitted to him by the State Personnel Board, was performing a discretionary function. As such, the burden is then on Parsa to show that White violated Parsa's "clearly established" federal rights and that every reasonable state officer faced with these circumstances would have known that his actions violated clearly established statutory or constitutional laws. *Ziegler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983) (per curiam).

The issue is a very fact specific one: Was it reasonable for White to rely on the certification of eligibles issued by the State Personnel Department, reflecting that the two

applicants to whom he offered the appointment were qualified to hold the position? Was it likewise reasonable for White to rely on the instructions of the Governor's transition team to remove Parsa from his sensitive provisional appointment because Parsa was perceived as a security risk to a smooth transition and the new administration? Was it likewise reasonable for White to conclude that the submission of Parsa to the Governor for permanent appointment would have been rejected or, at best, would have caused heated debate over the appointment wherein the recommendation of one of the other qualified candidates would not? Considering the fact specific nature of this particular job, it cannot be said that every reasonable official would have known that such actions were clearly illegal.

In holding that White was entitled to qualified immunity, the district court correctly concluded that "no reasonable factfinder could determine other than 'that a person in . . . [White's] position could reasonably believe' that he had no obligation to oppose Waldrep's adamant opposition to Parsa. *Bates v. Hunt*, 3 F.3d 374, 379 n.9 (11th Cir. 1993)." (R 2-47-20).

(4) Summary judgment was proper to Defendant Ballard.

The claim against Ballard was asserted in her official capacity only in order to achieve any injunctive relief granted. Because Ballard's liability is wholly derivative of White's, summary judgment was correct in her favor.

CONCLUSION

For the foregoing reasons, Respondents submit that the Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,

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